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I.

LOUISVILLE AND NASHVILLE RAILROAD RESPONSIBLE FOR LOWER RATES BY LINE VIA CINCINNATI TO NASHVILLE THAN TO CHATTANOOGA.

Counsel in his reply brief (p. 4) states that we are in error in saying that "it is admitted that the *low* rates by the line *via Cincinnati* to Nashville are attributable solely to the Louisville and Nashville Railroad," and contends that the trunk-line roads from the eastern seaboard to Cincinnati are jointly responsible for those low rates. It is true our statement would have been more accurate if we had said the *lower* rates by that line to Nashville than to Chattanooga are attributable to the Louisville and Nashville road.

The proof shows, and it is not denied, that the trunk lines charge the *same rates* as far as Cincinnati on shipments of traffic from the Eastern seaboard to Chattanooga that they charge on such shipments to Nashville. *The trunk-line rates are the same whether the shipments are to Nashville or to Chattanooga. Therefore, the lower rates via Cincinnati to Nashville than to Chattanooga are not attributable to the trunk lines. The lower rates by that route to Nashville commence at Cincinnati, and for this the Louisville and Nashville road is responsible.* (*See original printed argument for appellees, pp. 28, 29.*)

The rates of the Louisville and Nashville road from Cincinnati to Nashville and those of the Cincinnati, New Orleans and Texas Pacific road from Cincinnati to Chattanooga are shown below:

	1	2	3	4	5	6
Cincinnati to Chattanooga	49	41	42	43	34	27
Cincinnati to Nashville	26	21	16	12	10	9

(*See Report and Opinion of the Commission, transcript of record, pp. 43, 44.*)

II.

OWNERSHIP OR CONTROL OF ENTIRE LINE FROM EASTERN SEABOARD TO NASHVILLE NOT NECESSARY TO IMPOSE RESPONSIBILITY.

MEMBERSHIP IN THE THROUGH LINE SUFFICIENT.

OTHERWISE NONE OF THE DEFENDANTS ARE RESPONSIBLE, BECAUSE NONE OF THEM OWN OR CONTROL AN ENTIRE THROUGH LINE.

At the bottom of page 5 of his reply brief, counsel for the carriers says:

"If the Louisville and Nashville Railroad Company owned a line from New York via Augusta to Chattanooga and Nashville, *it might be held responsible for the relative adjustment of rates as between Chattanooga and Nashville.*"

This is equivalent to saying that the defendant carriers are only responsible where they own or control the entire through line. *If this be so, then none of the defendants are responsible, because none of them own or control an entire through line.*

It is too plain for argument that this position is not tenable. Responsibility results from participation by each member of the through line in the joint through rates complained of and in the transportation under

those rates. The through rates are the result of contract between the members of the through line and *their liability is both joint and several.*

In Texas and Pacific Ry. vs. *Interstate Commerce Commission* (*162 U. S., p. 205*), the proceeding was against the Texas and Pacific Railway Company alone, and objection was made that "the order of the Commission involved rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight was carried, and that the latter company was therefore a necessary party." But this court overruled the objection, saying, "*undoubtedly that company would have been a proper party, but we agree with the circuit court in thinking that it was not a necessary one.*" This shows the liability is *several as well as joint*, and that ownership or control of the entire line is not necessary to liability.

The line from Nashville through Chattanooga, Atlanta, Augusta, and Savannah on to the eastern seaboard is one of the principal lines involved in this case. The Louisville and Nashville road owns or controls that line all the way from Nashville through Chattanooga and Atlanta to Augusta, if not, as held by Judge Taft, all the way on through Savannah to the eastern seaboard. *It participates in the through rates charged over that line from the eastern seaboard to both Chattanooga and Nashville. This clearly fixes responsibility on that road.*

III.

THE LOUISVILLE AND NASHVILLE ROAD APPEARED VOLUNTARILY AND BECAME A PARTY DEFENDANT AFTER THE CASE IN COURT WAS INSTITUTED.

THE APPEARANCE OF THE LOUISVILLE AND NASHVILLE ROAD WAS NOT SPECIAL OR LIMITED, BUT GENERAL.

THE DEFENSE SET UP IN ITS ANSWER APPLIED TO AND INVOLVED DIRECTLY ITS OWN ROAD FROM CINCINNATI TO NASHVILLE.

(*a*) Counsel for the carriers denies in his reply brief that the Louisville and Nashville road "came into the case voluntarily." It is, perhaps, immaterial whether it appeared voluntarily or involuntarily; *the material fact is that it is a party defendant in court, and as such is subject to the order of the Commission and the decree of the court.*

It is beyond question, however, in our opinion, that the Louisville and Nashville road did "come into the case voluntarily."

The complaint before the Commission is on pages from 9 to 12, inclusive, of the record. The name of the

Louisville and Nashville road does not appear in that complaint as a party defendant or in any way. *It was not served with a copy of the complaint before the Commission.*

(*Transcript of record, pp. 9–12.*)

The petition or bill of complaint of the Commission in the United States circuit court for the eastern district of Tennessee will be found on pages from 2 to 8 of the record. The name of the Louisville and Nashville road does not appear in that bill of complaint as a party defendant or in any way. *It was not served with a copy of that bill of complaint.*

(*Transcript of record, pp. 2 to 8.*)

Making a party defendant of the Georgia Railroad Company, which it is said did not exist as a corporation, was not equivalent to suing the Louisville and Nashville Railroad.

In Paragraph VI of its answer filed in court, the Louisville and Nashville road alleges that it "did not appear" in the proceeding before the Commission.

(*Transcript of record, p. 89.*)

Not being a party defendant and not being served with process, the Louisville and Nashville road *voluntarily abstained* from appearing in the proceeding before the Commission, and not being a party defendant and not being served with process in the proceeding before the

court, its appearance and the filing of its answer was *voluntary.*

(*See transcript of record, pp. 87–93.*)

(*b*) THE APPEARANCE OF THE LOUISVILLE AND NASHVILLE ROAD IN COURT WAS NOT SPECIAL, BUT GENERAL.

On an examination of the answer of the Louisville and Nashville road it will be found that its appearance was not special or limited, but general. *If it could limit its liability as a defendant, under the circumstances in this case, to its interest in the line which it controls from Augusta through Atlanta and Chattanooga to Nashville, it did not do so.*

(*c*) THE DEFENSE SET UP IN THE ANSWER APPLIED TO ITS ROAD FROM CINCINNATI TO NASHVILLE.

An examination of the answer of the Louisville and Nashville road will show that the defense set up is that the rail rates from Cincinnati to Nashville are made lower than would otherwise be charged by river competition of the Ohio and Cumberland rivers from Cincinnati or Evansville to Nashville.

(*See Subdivision VII of Paragraph X, and also Paragraph XII of answer, pp. 91, 92, transcript of record.*)

This defense applies directly to the road of the Louisville and Nashville Company from Cincinnati to

Nashville, *because the rail rates from Cincinnati to Nashville are those of the Louisville and Nashville road alone.*

The Louisville and Nashville road, therefore, does not in its answer limit its defense to the line it controls from Augusta through Atlanta and Chattanooga to Nashville.

IV.

NO QUESTION OF COMPETITION OF MARKETS IN THIS CASE.

COUNSEL'S ERRONEOUS INTERPRETATION OF THE QUESTION OF MR. JUSTICE WHITE.

Mr. Justice White during the oral argument asked counsel for the carriers a question which he states in his reply brief (p. 14) to have been as follows:

> "Can the Louisville and Nashville Railroad Company justify the acceptance of exceptionally low rates to a city on its line when it is not compelled to do so by competition of other carriers at that city and the sole motive for doing so is to enable that city to compete with other cities located on other railroads?"

He contends that in effect this question is, to use his language, "whether *competition between markets* can be taken into consideration by carriers in charging less to longer than to shorter distance points," and says that it was involved in the case of L. & N. R. R. Co. *v.* Behlmer (175 U. S., p. —), decided at the present term.

We think that in this counsel for the carriers is in error. We can not see how the question propounded

by the court involves *the competition between markets referred to in the Behlmer case.* That competition was between *producing* as distinguished from *consuming* markets. It was contended that lower rates from Memphis to Charleston than to Summerville were justified because Chicago, New York, and other Eastern points competed in the sale of hay and grain at Charleston.

It is not necessary for us in this case to contest the proposition that competition between *producing* markets may be taken into consideration in establishing rates. *There is no such question in this case.* The proof shows that all the *producing* markets that compete for business to Nashville also compete for business to Chattanoga.

The proof shows not only that all the markets which compete for Nashville business compete also for Chattanooga business, but that *there are many more lines of transportation leading from those markets to Chattanooga than lead to Nashville.*

The competition referred to by Mr. Justice White in his question was that between Nashville and Chattanooga in the sale in common territory of goods shipped to those cities, respectively, from the eastern seaboard cities—those cities sustaining toward Chattanooga and Nashville the relation of *producing* markets.

V.

CONTENTION THAT COURT HAS NO POWER TO "MAKE A NEW ORDER SUBSTANTIALLY DIFFERENT FROM THE ORDER MADE BY THE COMMISSION."

WHERE A CARRIER NOT A PARTY BEFORE THE COMMISSION, AND HENCE NOT EMBRACED IN ITS ORDER, SUBSEQUENTLY BECOMES A PARTY TO THE PROCEEDING BEFORE THE COURT, THE COURT MAY, IF NECESSARY TO THE ENDS OF JUSTICE, MODIFY THE ORDER SO AS TO MAKE IT APPLICABLE TO SUCH CARRIER AND ITS VARIOUS LINES OF RAILWAY PARTICIPATING IN SOME OR ALL THE RATES IN QUESTION.

Counsel for the carriers devotes much space in his reply brief to an endeavor to show that "this court has no power to make a *new order substantially different* from the order made by the Commission."

It is not absolutely necessary in this case that the court should have or exercise such power, inasmuch as the order of the Commission will afford relief *as to the line through Chattanooga*, under section 3 as well as under section 4.

(See original printed argument for appellee, pp. 105, 106, and supplemental argument for appellee, p. 13.)

The order of the Commission, if complied with by reducing the Chattanooga rates, may also, measurably at least, afford relief under section 1, which forbids the exaction of excessive rates.

COURT MAY MODIFY ORDER IN THIS CASE, IF DEEMED NECESSARY.

While it is not necessary to contend in this case that the court may make "a *new order substantially different* from that of the Commission," we insist that the court may *modify* the order of the Commission.

A modification of the order of the Commission is proper, if necessary to the ends of justice, because the Louisville and Nashville road was not a defendant and did not appear before, *and its interest in the matter in controversy was not disclosed to*, the Commission, AND HENCE IT WAS NOT EMBRACED IN THE ORDER OF THE COMMISSION.

Where a carrier not a party to the proceeding before the Commission *and whose interest in the matter in controversy is not disclosed to the Commission and who for that reason is not embraced in its order*, subsequently becomes a party to the proceeding in court, it is manifestly the duty and the right of the court, *if deemed necessary to the ends of justice*, to so modify the order as to make it applicable to that carrier and its various lines participating in some or all the rates in question.

THE DECREE OF THE CIRCUIT COURT, WHICH WAS AFFIRMED BY THE CIRCUIT COURT OF APPEALS, REQUIRES ALL THE DEFENDANTS BEFORE THE COURT TO OBEY THE ORDER.

While the order of the Commission did not apply to the Louisville and Nashville road *eo nomine*, the decree of the circuit court, which was affirmed by the circuit court of appeals, applies to *all the defendants in court*. The language of the decree is that "*the various defendants, each and all of them*," obey the order of the Commission.

(*Transcript of record, p. 381.*)

The order of the Commission, however, strictly speaking, applies only to the line or lines *through Chattanooga* to Nashville, because it forbids the greater charge for the shorter haul to Chattanooga than is charged "*over the same line and in the same direction*" to Nashville.

Under the decree of the court requiring all the defendants, including the Louisville and Nashville road, to obey the order, that road as a member of, or because of its interest in, the line via Augusta, Atlanta, and Chattanooga to Nashville is subject to the order under section 4 of the law. The order, however, should be so modified as to make it embrace the line, composed in

part of the Louisville and Nashville road, *through Cincinnati* to Nashville, *thus enforcing the liability of the Louisville and Nashville road under section 3 of the law* for the undue preference it gives to Nashville over Chattanooga by both its lines, to wit, that via Cincinnati and that via Chattanooga.

This will defeat any attempt on the part of the Louisville and Nashville road to nullify the order of the Commission as it now stands by maintaining lower rates over the line via Cincinnati to Nashville than are charged to Chattanooga.

IF, HOWEVER, THE COURT SHOULD BE OF OPINION THAT IT CAN NOT SO MODIFY THE ORDER, THAT IS NO GROUND FOR NOT ENFORCING THE ORDER AS IT NOW STANDS AS TO THE LINES TO AND THROUGH CHATTANOOGA TO NASHVILLE.

(*See supplemental brief for appellee, pp. 8, 9.*)

We insist that we are correct in our proposition, that the language of this court in the Alabama Midland case, namely, that "the court is not restricted to a consideration merely of the power of the Commission *to make the particular order in question*, * * * and that the duty of the court is to decide, as a court of equity, *upon the entire body of the evidence*," would seem to imply or recognize power in the court to change or modify the order so as to adapt it to the ends of justice.

In addition to the authorities on this point cited in our original and supplemental briefs, we give the following extract from the opinion of Judge Jackson in Kentucky and I. Bridge Company *v.* Louisville and Nashville Railroad Company:

"The act to regulate commerce does not make the circuit court the mere executioner of the Commission's order or recommendation, so as to impose upon the court *a nonjudicial power.*"

(37 Fed. Rep., p. 907.)

The construction by counsel of the word "*premises*," as used in section 16 of the law, that it refers to the order of the Commission as made, is too narrow. *Hæret in cortice.*

In this connection we quote what is said on this point by Mr. Edmunds in his argument filed in this court in the Alabama Midland case:

"The words 'lawful order' mean an order the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to 'hear and determine the matter'—that is, the whole subject—'as a court of equity, * * * in such manner as to do justice in the premises'—that is, complete justice in the whole premises. 'Premises' is not merely the particular order that the Commission has made, but it is the

whole subject that had been duly brought before the Commission and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court and is now imposed upon this court."
(168 U. S., p. 159.)

Certainly where a new party has come in or been brought in before the court which was not before the Commission, and whose liability was not disclosed to the Commission, the order may be modified by the court so as to meet this new condition and do complete justice.

O

L. A. Shaver

for appellee